Extension of Implied Warranties to Subsequent Purchasers of Real Property: *Insurance Company of North America v. Bonnie Built Homes.*

INTRODUCTION

Part of the great American dream is to own one's own home. But as many new homeowners find out, what they think is the fulfillment of their dream is actually a nightmare. Thousands of Americans bought new homes in the 1950s and 1960s[1] only to discover a short time after purchase that the house contained a major defect; perhaps the plumbing did not work, the roof leaked, the plaster was cracked, or the foundation was sinking. The major investment of a lifetime was in jeopardy, and under the doctrine of *caveat emptor* the homeowner could not maintain an action against the builder unless the work was expressly warranted. To protect homeowners from this harsh result, most courts have either modified or abolished the doctrine of *caveat emptor* as applied to the housing industry.[2] Ohio courts have modified the doctrine by imposing a duty of workmanlike construction upon the builder.[3] Other states have created an implied warranty of habitability[4] to protect the homeowner.[5]

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1. Privately owned housing starts by year:

New Starts in thousands

Year	Number	Year	Number
1945	325	1956	1325
1946	1015	1957	1175
1947	1265	1958	1314
****	****	1959	1494
1950	1908	1960	1230
1951	1420	1961	1284
1952	1446	1962	1439
1953	1402	1963	1581
1954	1532	1964	1530
1955	1627		

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HOUSING CONSTRUCTION STATISTICS 1889–1964, at 20 (1964).

2. Cases in which courts have abolished *caveat emptor* and granted an implied warranty of habitability include: Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1968); Theis v. Hever, 264 Ind. 1, 280 N.E.2d 300 (1972); and Humber v. Morton, 426 S.W.2d 554 (Tex. Civ. App. 1968). *See* Annot., 25 A.L.R.3d 383 (1969). Cases in which courts have modified *caveat emptor* include Weck v. A:M Sunsire Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962), and Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957). *See* Comment, *Implied Warranties—Sale of a Completed House*, 1 CAL. W.L. REV. 110 (1965), and Annot., 25 A.L.R.3d 383 (1969).

3. Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

4. Habitability is the "[c]ondition of premises which permits inhabitant to live free of serious defects to health and safety." BLACK'S LAW DICTIONARY 639 (5th ed. 1979). "[A]n implied warranty is one imposed by law . . . to impel just results between parties." Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 272, 149 N.E.2d 181, 186 (1958). "Under an implied warranty of habitability the builder-vendor warrants that he has complied with the building code of the area and that the residence was built in a workmanlike manner and is suitable for habitation." Duncan v. Schuster-Graham Homes, Inc., 39 Colo. App. 92, 563 P.2d 976, 977–78, *rev'd on other grounds*, 194 Colo. 441, 578 P.2d 637 (1978).

5. *See supra* cases cited in note 2; *see also* Coney v. Stewarit, 263 Ark. 148, 562 S.W.2d 619 (1978); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975); and cases cited in Annot., 25 A.L.R.3d 383 (1969).

In these jurisdictions the homeowner receives much the same protection in the purchase of a house as the Uniform Commercial Code affords purchasers of goods.[6]

The modifications of the doctrine of *caveat emptor* unfortunately do not solve the housing problem completely. Because of the increased mobility of the American public many new homeowners sell their homes before defects become apparent and actionable. This situation raises the question of whether a subsequent purchaser of a relatively new home, who buys with the expectation that it is sound and then discovers a defect shortly thereafter, has a cause of action against the builder. The Ohio Supreme Court answered this question in *Insurance Company of North America v. Bonnie Built Homes*[7] by holding that the second purchaser could not establish a cause of action against the builder.[8]

In March 1976 Bonnie Built Homes completed construction of a house for Alvin Mudge. In the summer of 1976 Mudge sold the house to the Shaffers; after living in the home approximately one year, they discovered that the roof leaked badly. Their insurance company paid the cost of the repairs and became subrogated to the rights of the Shaffers for the amount of the repairs.[9] The Ohio Supreme Court held that because the Shaffers were not in privity of contract with Bonnie Built Homes, the insurance company could not establish a cause of action against the builder.[10] By so holding, the court refused to join other jurisdictions that had granted protection to subsequent purchasers.[11] The court has continued to cling to the archaic concept of privity of contract and has refused to recognize the economic and social implications arising from the sale of homes in today's society. The time has come for Ohio to abandon the doctrine of *caveat emptor* as applied to subsequent purchasers and step out of the dark ages of property law into the twentieth century.

This Case Comment will trace the development of Ohio consumer law in the construction area from strict application of the doctrine of *caveat emptor* to the adoption of a duty of workmanlike construction owed to the first purchaser of an uncompleted home. Then it will review the Ohio Supreme Court's recent refusal in *Insurance Company of North America v. Bonnie Built Homes* to extend this duty to second purchasers. This Case Comment also will suggest why the decision was decided wrongly. Finally, this Case Comment will offer reasons in support of an extension of an implied warranty of workmanlike construction to all subsequent purchasers of homes.

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6. U.C.C. §§ 2-314, 2-315 (1977).
7. 64 Ohio St. 2d 269, 416 N.E.2d 623 (1980).
8. *Id.* at 271, 416 N.E.2d at 625.
9. *Id.* at 269, 416 N.E.2d at 624.
10. *Id.* at 269, 416 N.E.2d at 623.
11. Blagg v. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981); Redarowitz v. Ohlendorf, ___ Ill. ___, ___ N.E.2d ___ (1982); Barnes v. MacBrown & Co., Inc., 264 Ind. 227, 342 N.E.2d 619 (1976); Casavant v. Campopiano, 114 R.I. 24, 327 A.2d 831 (1974); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980); Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979).

I. The Development of the Law in Ohio

A. Caveat Emptor

Before 1966 the doctrine of *caveat emptor* restricted consumers' rights in the purchase of real property in Ohio. In *Shapiro v. Kornicks*[12] the court of appeals applied the doctrine to the sale of residential property, thus giving builders virtual immunity from suits by purchasers:

> In the absence of an express warranty, the vendor of residence property, sold under a written agreement, is not liable to the purchaser for damages because of defects in the house claimed to have developed after the purchaser came into possession, unless the vendor was guilty of fraud in failing to make disclosure of known latent defects or in making fraudulent representations.[13]

In recent years the doctrine of *caveat emptor* has come under increasing attack by commentators as an unconscionable restriction on consumer rights;[14] many courts have felt pressure to modify the doctrine. The Cuyahoga County Court of Appeals responded to this outcry by modifying the doctrine in *Vanderschrier v. Aaron.*[15] The court held that in the case of an uncompleted structure the builder implicitly warranted that "it will be completed in a workmanlike manner and reasonably fit for occupancy."[16] The court held, however, that *caveat emptor* still applied to the sale of completed structures.[17]

B. *Duty of Workmanlike Construction:* Mitchem v. Johnson

1. *The Decision*

The Ohio Supreme Court modified the holding of *Vanderschrier* in *Mitchem v. Johnson*[18] by refusing to adopt that court's implied warranty of fitness for a particular purpose (habitability) in favor of a purchaser of an uncompleted home against the builder-vendor.[19] However, the supreme court did impose a duty on the defendant builder to construct the home in a workmanlike manner.[20] The court dealt with the problem as though two distinct causes of action existed: one based on an implied warranty theory, which the court refused to recognize, and the other based on a contractual duty.[21] This

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12. 103 Ohio App. 49, 124 N.E.2d 175 (1955).
13. *Id.* at 49–50, 124 N.E.2d at 177.
14. *See* Bearman, Caveat Emptor *in Sales of Reality—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); Haskell, *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965); Roberts, *Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967); Comment, *Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings*, 43 DENVER L.J. 379 (1966); Comment, Caveat Emptor: *A Pierced Shield*, 15 DEPAUL L. REV. 440 (1966).
15. 103 Ohio App. 340, 140 N.E.2d 819 (1957).
16. *Id.* at 340, 140 N.E.2d at 820.
17. *Id.* at 341, 140 N.E.2d at 821.
18. 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).
19. *Id.* at 70, 218 N.E.2d at 595.
20. *Id.*
21. Syllabus two speaks of an implied warranty that will not be granted. Syllabus three speaks of a duty that will be imposed. *Id.*

dichotomy of actions, however, has become blurred as later Ohio courts have interpreted the duty as an implied warranty.

In *Mitchem* the plantiff alleged that the defendant builder had located the house in an area with surface water problems. During periods of excessive rainfall the high soil moisture made the septic tanks ineffective and rendered the interior toilet facilities partially unusable.[22] The plaintiff alleged further that the defendant had used improper roofing materials and had installed them improperly, resulting in a defective roof.[23] The trial court allowed recovery. The defendant appealed, arguing that the court's instructions to the jury were in error. In its charge the court stated that the builder should be held to "an implied term of the sale that [he] will complete the house in such a way that it will be reasonably fit for its intended use and that the work [will] be done in a reasonably efficient and workmanlike manner."[24]

The Lucas County Court of Appeals reversed and remanded,[25] and the Ohio Supreme Court affirmed.[26] The supreme court held that no implied warranty of fitness for a particular purpose in favor of a vendee would be imposed against a builder-vendor on an uncompleted structure.[27] Approving the rationale of *Shapiro v. Kornicks*[28] the court stated that:

> the overwhelming weight of authority is that *caveat emptor* controls the purchase and sale of a *completed* structure, and the vendor will not be strictly liable to the vendee on an implied warranty that the structure is fit or suitable for the purpose ordinarily intended, even though the vendor was responsible for its construction.[29]

The court, however, did not say that the defendant was entitled to final judgement.[30] Instead, the court remanded, imposing upon the builder-vendor the duty to construct the building in a

> workmanlike manner and to employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the structure against faults and hazards, including those inherent in its site. If the violation of that duty proximately causes a defect hidden from revelation by an inspection reasonably available to the vendee, the vendor is answerable to the vendee for the resulting damages.[31]

2. *Tort or Implied Warranty?*

A question arising in later cases is whether the duty imposed on builders by *Mitchem* is a tort duty of workmanlike construction or an implied warranty

22. *Id.* at 67, 218 N.E.2d at 595–96.
23. *Id.* at 67, 218 N.E.2d at 595.
24. *Id.* at 68, 218 N.E.2d at 596.
25. *Id.*
26. *Id.* at 73, 218 N.E.2d at 599.
27. *Id.* at 66, 218 N.E.2d at 595.
28. 103 Ohio App. 49, 124 N.E.2d 175 (1955).
29. 7 Ohio St. 2d 66, 70, 218 N.E.2d 594, 597 (1966) (emphasis in original).
30. *Id.* at 72, 218 N.E.2d at 598.
31. *Id.* at 66, 218 N.E.2d at 595.

of workmanlike construction, similar to the implied warranty of fitness for a particular purpose (habitability) imposed by the *Vanderschrier* court.[32] Ohio appellate courts have responded to the question in both ways. In *Benson v. Dorger*[33] the Hamilton County Court of Appeals held that the duty recognized in *Mitchem* sounded in negligence. The court focused on the language in syllabus three of the *Mitchem* opinion containing words generally associated with tort actions.[34] A different interpretation of *Mitchem* was asserted by the Franklin County Court of Appeals when it held in *Lloyd v. William Fanin Builders, Inc.*[35] that, when the house was an uncompleted structure, *Mitchem* imposed a contractual duty of workmanlike construction upon the builder-vendor.[36] Unlike the *Benson* court, the *Lloyd* court focused on *Mitchem's* statement that "an implied term of the *sale* [requires] that . . . it be done in a workmanlike manner"[37] and concluded that because a sale is a contract the duty arises *ex contractu*, not *ex delicto*. In *Tibbs v. National Homes Construction Corp.*[38] the Warren County Court of Appeals relied on the same rationale used by the *Lloyd* court and held that the duty in *Mitchem* was an implied warranty of workmanlike construction.[39]

Of these two approaches the *Tibbs* and *Lloyd* approach seems most acceptable. Although the *Benson* court was correct when it viewed the words used by the *Mitchem* court as those associated with tort actions, both of these courts possibly failed to recognize that an implied warranty is what Prosser calls a "freak hybrid born of the illicit intercourse of tort and contract, originating in tort and still maintaining a tort character."[40] Thus, an implied warranty can be described in language usually reserved to describe tort actions. Although the *Tibbs* and *Lloyd* decisions appear to give the correct answer to the question raised in *Mitchem*, they also seemingly lead to a direct contradiction of that court's refusal to apply an implied warranty theory to the sale of housing.[41]

In *Insurance Company of North America v. Bonnie Built Homes*[42] the Supreme Court of Ohio accepted the reasoning of *Tibbs* and *Lloyd*,[43] while reiterating the holding of *Mitchem* by refusing "to apply the theory of implied warranty . . . to real-property construction cases."[44] Although the *Tibbs* and

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32. *Vanderschrier* held in part that the builder implicitly warranted that he would complete the house in a workmanlike manner. *See supra* text accompanying note 16.

33. 33 Ohio App. 2d 110, 292 N.E.2d 919 (1972).

34. The court focused on such words as "workmanlike manner," "to employ such care and skill," "if violation of that duty proximately causes," and "answerable to the vendee for resulting damages" to conclude that the *Mitchem* duty is a tort duty. *Id.* at 115, 292 N.E.2d at 922.

35. 40 Ohio App. 2d 507, 320 N.E.2d 738 (1973).

36. *Id.* at 510, 320 N.E.2d at 741.

37. *Id.* at 509–10, 320 N.E.2d at 740.

38. 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1977).

39. *Id.* at 281, 369 N.E.2d at 1220.

40. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 800 (1966).

41. Mitchem v. Johnson, 7 Ohio St. 2d 66, 72, 218 N.E.2d 594, 598–99 (1966).

42. 64 Ohio St. 2d 269, 416 N.E.2d 623 (1980).

43. *Id.* at 271, 416 N.E.2d at 624–25.

44. *Id.*, 416 N.E.2d at 624.

Mitchem positions seem irreconcilable, one possible explanation for their continued compatability is that the Ohio Supreme Court is considering only a warranty of habitability and not a warranty of workmanlike construction when it refuses to apply an implied warranty theory to real property cases.

What the *Mitchem* court finds objectionable in the application of warranty theory to real property cases is that a "warranty obviate[s] the necessity of plaintiff's proving, and the triers of the facts finding a lack of good workmanship, . . . and that such lack of good workmanship proximately caused the damage."[45] This objection, however, is applicable only to an implied warranty of habitability, When a plaintiff alleges a breach of a duty or warranty of workmanlike construction, he must prove that the condition was caused by the defendant.[46] If the plaintiff cannot prove that the condition was the defendant's fault, he cannot establish a valid cause of action for unworkmanlike construction,[47] but may bring an action for breach of an implied warranty of habitability. Thus, the supreme court's objection to an implied warranty theory has no bearing on a cause of action brought under an implied warranty of workmanlike construction because in the latter action the plaintiff must show that the builder failed to exercise proper workmanship and that this lack of workmanship caused the damage. The burden of proof is on the plaintiff, as the court intended when it set out the duty in *Mitchem*.[48]

Recently in *Velotta v. Leo Petronzio Landscaping, Inc.*[49] the Ohio Supreme Court specifically objected to the characterization of the defendant builder's duty as an implied warranty of habitability, preferring to label it an "obligation to perform in a workmanlike manner."[50] The court held that this duty as applied to completed housing was a tort duty.[51] The court expressed no opinion whether it would reach a different result in the case of an uncompleted house.[52] Thus, *Lloyd* and *Tibbs* are still good law.

In its discussion of the builder's duty the court stated:

> The duty implied in the sale between the builder-vendor and the immediate vendee is the duty imposed by law on all persons to exercise ordinary care.[53] In an action [alleging poor workmanship] . . . the essential allegation is, *viz.*, the builder-vendor's *negligence* proximately caused the vendee's damages. The action, therefore, arises *ex delicto*. . . . *The obligation to perform in a workmanlike manner* using ordinary care may arise from or out of the contract, *i.e.*, from the purchase agreement, but the cause of action is not based on contract; rather it is based on *a duty imposed by law*.[54]

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45. Mitchem v. Johnson, 7 Ohio St. 2d 66, 72, 218 N.E.2d 594, 598–99 (1966).
46. Hubler v. Bachman, 12 Ohio Misc. 22, 23 (1967).
47. *Id.*
48. *See* Mitchem v. Johnson, 7 Ohio St. 2d 66, 72, 218 N.E.2d 594, 598–99 (1966).
49. 69 Ohio St. 2d 376, 433 N.E.2d 147 (1982).
50. *Id.* at 378–79, 433 N.E.2d at 150.
51. *Id.* at 379, 433 N.E.2d at 150.
52. *Id.* at 378 n.2, 433 N.E.2d at 150 n.2.
53. The court, however, is quick to point out that this duty of ordinary care only applies to the first purchaser. *Id.* at 378 n.1, 433 N.E.2d at 150 n.1.
54. *Id.* at 378–79, 433 N.E.2d at 150 (emphasis in original).

The court's characterization of the defendant builder's obligation to perform in a workmanlike manner as a tort duty is incorrect for several reasons. First, its language is contrary to that of *Bonnie Built Homes* and *Mitchem*—cases in which the court found that "[t]he duty of the builder-vendor to build a structure in a workmanlike manner . . . [is] a duty arising out of the contract of sale and not out of a general duty owed to the public at large."[55] Second, the court's argument that the duty is a tort duty because it is imposed by law also is unpersuasive: an implied warranty also is imposed by law to achieve just results between the parties.[56]

The essential assertion is not that the builder-vendor's negligence proximately caused the vendee's damages, but that the vendee did not receive what he bargained for—quality workmanship. The builder implicitly warrants that he will use ordinary care and skill to insure quality workmanship, and the vendee agrees to compensate the builder for this warranty. If a defect occurs that was caused by the builder's failure to exercise ordinary care, the builder-vendor has violated this warranty. The action, therefore, is *ex contractu*.

If this analysis is correct, why, then, did the *Velotta* court find that the defendant's duty was *ex delicto*? Apparently, the court was unable to distinguish between an implied warranty of habitability and an implied warranty of workmanlike construction. To avoid extending an implied warranty of habitability, the result of which would make the builder an insurer, the court felt it had to use tort language. In *Velotta* the court stated:

> [U]nder implied warranty, not imposed by *Mitchem*, the vendee would recover upon showing merely a defect in the structure and causation, even though the builder-vendor proved ordinary care and skill in the construction of the residence. To permit recovery under implied warranty without requiring proof of negligence would be in the nature of strict liability . . . .[57]

These statements apply only to an implied warranty of habitability, not an implied warranty of workmanlike construction. Unable to distinguish between the two types of warranties, the *Velotta* court refused to use implied warranty language at all.

The primary distinction between a tort action and an action based on an implied warranty of workmanlike construction lies in procedural grounds. The statute of limitations for a contract action is fifteen years,[58] while a tort action has a four year limitation.[59] In addition, punitive damages are available in tort actions but not in contract actions.[60] Aside from procedural differences, however, the issue of whether a duty lies in tort or contract is largely

55. Insurance Co. of N. Am. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 270, 416 N.E.2d 623, 624 (1980) (citing Mitchem v. Johnson, 7 Ohio St. 2d 66, 73, 218 N.E.2d 594, 597 (1966)).

56. Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 272, 149 N.E.2d 181, 186 (1958).

57. Velotta v. Leo Petronzio Landscaping, Inc., 69 Ohio St. 2d 376, 377–78, 433 N.E.2d 147, 149 (1982).

58. OHIO REV. CODE ANN. § 2305.06 (Page 1979).

59. *Id.* § 2305.09.

60. Tibbs v. Nat'l Homes Constr. Corp., 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1977).

one of semantics. Both actions require the same standard of proof—preponderance of the evidence. This Case Comment, therefore, will treat the *Mitchem* duty as an implied warranty of workmanlike construction.

3. *What Constitutes Unworkmanlike Construction?*

The *Mitchem* decision limits recovery to "defects hidden from revelation by an inspection reasonably available to the vendee."[61] Thus, if the condition was discoverable at the time of the sale by a reasonable inspection, the vendee loses any cause of action against the builder arising from his duty to build in a workmanlike manner. A duty, therefore, is imposed upon the vendee to inspect the house for defects.

A builder is held to a standard of ordinary care except "in the case of an extraordinarily hazardous transaction."[62] Ordinary care refers to the degree of care that would be exercised by the average builder. The builder must exercise such care in the construction of the home and in his choice of the materials and site for the home.[63] Thus, if the average builder conducts soil tests before choosing a site, the defendant builder must act accordingly; if he does not, he has constructed the house in an unworkmanlike fashion, and the homeowner should be able to maintain an action against him if, for example, the septic system fails to function properly.[64] Similarly, if an ordinary builder could not ascertain that a weld on a structural steel beam was defective, the defendant builder would not be liable for the resulting collapse of the building.[65]

In assessing whether the construction has been done in an unworkmanlike fashion, the court must look at two categories: the physical work, and the planning and selection of sites and materials. One consideration in determining what constitutes unworkmanlike construction in both categories is the standard of quality required by usage of trade: what techniques and types of materials would the average builder use in this situation? If the builder uses the techniques and materials prescribed by the industry standard, the builder apparently has met the duties of workmanlike construction and ordinary care.[66]

Another consideration in determining what constitutes unworkmanlike construction is whether the builder has knowledge superior to that of the average builder. If the plaintiff can prove that the builder knew or should have known of the defect, even though an average builder would not have known,

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61. Mitchem v. Johnson, 7 Ohio St. 2d 66, 72, 218 N.E.2d 594, 598 (1966).

62. *Id.* at 70, 218 N.E.2d at 597.

63. *Id.* at 66, 218 N.E.2d at 595.

64. *Id.*

65. See Flannery v. St. Louis Architectural Iron Co., 194 Mo. App. 555, 558, 185 S.W. 760, 761 (1916), which the *Mitchem* court expressly approved. 7 Ohio St. 2d 66, 69, 218 N.E.2d 594, 597 (1966).

66. A caveat to the use of industry standards as a defense is The T.J. Hooper, 69 F.2d 737 (2d Cir. 1932), a case in which custom and practice in the shipping industry was no defense when the defendant did not take measures dictated by common sense. *Id.* at 740.

the builder's conduct can be viewed as unworkmanlike.[67] If the average builder possesses superior knowledge, the law presumes he will use it. Holding the builder to this higher standard also is justified since the vendee probably is paying more for the house because it was built by a superior builder.

Another important consideration in determining what constitutes unworkmanlike construction is whether the house was built to the buyer's specifications. If the buyer specifies a certain material or technique that would be improper or uncommon if implemented, the buyer should be estopped from bringing an action against the builder,[68] assuming the builder relates his knowledge concerning the improper or uncommon use. The ordinary builder should not be held to the standard of an architect; therefore the builder who builds according to the buyer's plans need only meet the standard of care required of the average builder following an architect's plans.[69] But if the average builder could look at the plans and detect a material mistake or miscalculation, he should be held liable for unworkmanlike construction if he fails to correct the mistake.[70] This result is fair because it is unconscionable to allow the builder to receive compensation for constructing a house that he knows is defective.

II. Extending the Duty to Subsequent Purchasers

A. *Reasons for Refusing Extension:* Insurance Company of North America v. Bonnie Built Homes

In *Insurance Company of North America v. Bonnie Built Homes*[71] the Ohio Supreme Court faced the issue of extending the duty of workmanlike construction to subsequent purchasers. The court gave three reasons for refusing to extend the duty of workmanlike construction: first, the plaintiff insurance company was not in privity of contract with Bonnie Built Homes;[72] second, if the builder were held responsible to subsequent purchasers, he would assume the position of an insurer with absolute liability;[73] and third, only the legislature, and not the court, had the authority to extend the scope of protection afforded by the implied warranty of workmanlike construction.[74]

In the following sections this Case Comment will examine critically each reason advanced by the Ohio Supreme Court for disallowing extension of an implied warranty of workmanlike construction to subsequent purchasers.

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67. This notion of superior knowledge is similar to the tort notion as expressed in the *Restatement (Second) of Torts*, which reads as follows: "The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising . . . (b) such superior attention, perception, memory, knowledge, intelligence, and judgement as the actor himself has." RESTATEMENT (SECOND) OF TORTS § 289 (1965).

68. *See* Haskell, *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 640 (1965); 11 S. WILLISTON, LAW OF CONTRACTS § 1399A (3d ed. 1961 & Supp. 1980) and cases cited therein.

69. *See supra* authorities cited in note 68.

70. *See* Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 17 (1936).

71. 64 Ohio St. 2d 269, 416 N.E.2d 623 (1980).

72. *Id.* at 271, 416 N.E.2d at 625.

73. *Id.*

74. *Id.*

1. *Privity of Contract*

The first reason advanced by the *Bonnie Built Homes* court to explain its refusal to extend the duty of workmanlike construction to the plaintiff was that no privity existed between the two parties. The court's analysis rested on two grounds. First, the court, relying on language in *Mitchem*, refused to accept the plaintiff insurance company's argument that faulty construction cases are analogous to products liability cases and so should receive similar treatment. In two products liability cases, *Lonzrick v. Republic Steel Corp.*[75] and *Iacono v. Anderson Concrete Co.*,[76] the Ohio Supreme Court did not require the plaintiff to be in privity with the defendant to establish a cause of action. In *Lonzrick* the manufacturer of defective steel joints was held liable to a remote purchaser, not in privity, for tort damages.[77] The court held that the manufacturer implicitly warranted that the products were fit for the purpose used.[78] In *Iacono* the holding of *Lonzrick* was extended to cover a case concerning property damages alone.[79]

The supreme court held that these two cases were inapposite to *Bonnie Built Homes*.[80] It opined that "[t]hey are products liability cases based on breach of an implied warranty, an area of the law distinct from that involved here."[81] The court went on to state that "[i]n *Mitchem*, this court . . . refused to apply the theory of implied warranty that it had adopted in *Lonzrick* . . . ."[82]

The Ohio Supreme Court's reasoning is unsound. The court fails to recognize that two types of implied warranties exist: an implied warranty of fitness for a purpose and an implied warranty of workmanlike construction. In *Mitchem* the court refused to adopt the warranty of fitness for a particular purpose that it had adopted in *Lonzrick*.[83] However, the court did adopt a duty of workmanlike construction[84] that later courts have labeled an implied warranty of workmanlike construction.[85] The *Mitchem* court's refusal to adopt the *Lonzrick* implied warranty is neither controlling nor persuasive in faulty construction cases; it simply recognizes that the "theory of implied warranty"[86] adopted by the supreme court is not an implied warranty of fitness for a particular purpose.

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75. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).
76. 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).
77. Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).
78. *Id.* at 235, 218 N.E.2d at 191.
79. Iacono v. Anderson Concrete Co., 42 Ohio St. 2d 88, 93, 326 N.E.2d 267, 271 (1975).
80. Insurance Co. of N. Am. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 271, 416 N.E.2d 623, 624 (1980).
81. *Id.*, 416 N.E.2d at 624.
82. *Id.*
83. Mitchem v. Johnson, 7 Ohio St. 2d 66, 66, 218 N.E.2d 594, 595 (1966).
84. *Id.*
85. Tibbs v. National Homes Constr. Corp., 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1977); Lloyd v. William Fanin Builders, Inc., 40 Ohio App. 2d 507, 320 N.E.2d 738 (1973). *See supra* text accompanying notes 35–39.
86. Insurance Co. of N. Am. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 271, 416 N.E.2d 623, 624–25 (1980).

The court did adopt a duty of workmanlike construction that is not dissimilar to the warranty imposed by the court in *Lonzrick*. The major difference between the two warranties is that the plaintiff has the burden in workmanlike construction cases to show that the defect was caused by the fault of the defendant builder, whereas in the products liability cases the plaintiff does not carry such a burden.[87] The difference in warranties is only of degree, not kind, as the court holds. Any real distinction exists not, as the court holds, in the protection afforded by the warranties, but because one warranty arises in a property context and the other in a sale of goods.

In *Bonnie Built Homes* the builder warranted that he would perform his work in a workmanlike manner. A remote purchaser should be able to recover when the structure is not completed in a workmanlike manner. The only distinction between the two warranties is that the burden is placed on the plaintiff in an unworkmanlike construction duty case to show that the builder was responsible for the defects.[88]

To show a breach of the duty of workmanlike construction, the plaintiff must prove that the builder's fault caused the defect. Since the plaintiff carries such a substantial burden, no reason exists to afford the defendant additional protection by requiring privity of contract. Courts have used the privity requirement to limit liability and thereby keep manufacturers and builders from becoming insurers.[89] By extending the *Mitchem* duty to protect subsequent purchasers the court would not be placing the builder in a strict liability situation, because subsequent purchaser-plaintiffs would still have to show that the builder is responsible for the defect. Therefore, an extension of the implied warranty of *Mitchem* to the subsequent purchasers in *Bonnie Built Homes* is easier to justify than is the extension of products liability protection to those purchasers in *Lonzrick*.[90]

The second ground advanced by the *Bonnie Built Homes* court to support a privity of contract requirement is that:

> [t]he duty of the builder-vendor to build a structure in a workmanlike manner is a duty arising out of the contract of sale and not out of a general duty owed to the public at large. . . . In the absence of privity the action must fail because there is no contractual basis upon which to determine the duty owed.[91]

The court's view that the duty arises out of the contract of sale is simply a matter of judicial imposition—in the absence of express language in the contract, little evidence exists to support the argument that the duty arises solely from the contract. A better view is that the implied warranty or duty "springs

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87. *See supra* text accompanying note 46.

88. *See supra* text accompanying notes 46–48.

89. *See, e.g.*, Brown v. Fowler, 279 N.W.2d 907, 910 (S.D. 1979).

90. In the *Lonzrick* case the manufacturer is placed in a strict liability situation, but in *Bonnie Built Homes* the builder is not. Therefore, to avoid placing people in strict liability situations, the court should extend only the warranty in the *Bonnie Built Homes* case.

91. Insurance Co. of N. Am. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 270–71, 416 N.E.2d 623, 624 (1980) (citation omitted).

from the sale itself."[92] When emphasis is placed on the warranty as protection independent from the contract, the importance of privity is diminished.

By requiring privity for liability to ensue, the court's holding in *Bonnie Built Homes* allows a builder to defeat the purpose of the duty of workmanlike construction if he conveys the house to a third party who then makes the sale to the homeowner.[93] Thus, according to the Ohio Supreme Court, if *X* buys a home, never lives in it, and then conveys it to *Y* either by gift or otherwise, *Y* cannot recover from the builder for unworkmanlike construction because *Y* is not in privity with the builder.

Two courts faced with a question similar to the one presented in *Bonnie Built Homes* also relied on the lack of privity requirement to support their refusal to extend the warranty to subsequent purchasers.[94] The Illinois Court of Appeals, while recognizing that privity has "almost entirely" been "eliminated in tort actions,"[95] held that to extend liability would do violence to the long-standing distinction between tort and contract.[96] The court does not recognize that liability based on an implied warranty is a blend of tort and contract law; the distinction between the two areas is blurred.[97]

Ohio should follow the lead of other jurisdictions[98] that permit an extension of the implied warranty of workmanlike construction to the subsequent purchaser. To do so, the court would have to view the duty imposed on the builder to construct the house in a workmanlike fashion as independent of the parties' contract: the duty would be tied to the house itself, not to the contract.[99] Because the warranty is tied to the house, extending its protection to subsequent purchasers would not subject the builder to any greater liability than if the first purchaser had not sold the premises. Once a court recognizes this modification and its rationale, any limits on the builder's liability are arbitrary lines drawn for policy reasons.

If the duty to provide quality workmanship is tied to the contract, however, the parties arguably could modify the duty or eliminate it altogether. Although the question has not been addressed in Ohio, modifying the war-

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92. Terlinde v. Neely, 275 S.C. 395, 395, 271 S.E.2d 768, 769 (1980). *See* Beckett v. F.W. Woolworth Co., 376 Ill. 470, 473, 34 N.E.2d 427, 429 (1941): "An express warranty is one imposed by the parties to the contract and is a part of the contract of sale, whereas an implied warranty is not one of the contractual elements of an agreement but is, instead, imposed by law."; Tharp v. Allis-Chalmers Mfg. Co., 42 N.M. 443, 448, 81 P.2d 703, 706 (1938): "An implied warranty is not one of the contractual elements of an agreement . . . nor does its application or effective existence rest or depend on the affirmative intention of the parties . . . [but] [i]t arises independently and outside of the contract." (quoting Bekkevold v. Potts, 173 Minn. 87, 87, 216 N.W. 790, 791 (1927)).

93. *See, e.g.*, Duncan v. Schuster-Graham Homes, Inc., 39 Colo. App. 92, 563 P.2d 976, *rev'd*, 194 Colo. 441, 578 P.2d 637 (1978).

94. Mellander v. Kileen, 86 Ill. App. 3d 213, 407 N.E.2d 1137 (1980); Brown v. Fowler, 279 N.W.2d 907 (S.D. 1979).

95. Mellander v. Kileen, 86 Ill. App. 3d 213, 215, 407 N.E.2d 1137, 1138 (1980).

96. *Id.* at 214, 407 N.E.2d at 1138.

97. Prosser, *The Fall of the Citadel*, 59 MINN. L. REV. 791, 800 (1966). *See supra* text accompanying note 40.

98. *See infra* note 121 and accompanying text.

99. *See supra* note 92 and accompanying text.

ranty seemingly would be unconscionable.[100] Evidence that the duty is independent of the contract is shown by the imposition of the duty on the parties without their consent.[101]

Other courts have replaced completely the privity requirement with a test of foreseeability: was it foreseeable that defendant's conduct could affect other people? If the builder's actions were foreseeable, he is liable, and the duty should be extended despite the absence of privity.[102] Clearly, a builder should be able to foresee that a house may be sold to a subsequent party and that a defect caused by the builder's lack of workmanship could affect that purchaser. The Supreme Court of South Carolina adopted this rationale in *Terlinde v. Neely*. It stated that "[t]he key inquiry is foreseeability, not privity. In our mobile society, it is clearly foreseeable that more than the original purchaser will seek to enjoy the fruits of the builder's efforts."[103]

Several courts considering whether to require privity have drawn a distinction based on the type of damages to be awarded—personal injury or property damages.[104] Privity is not required in an action for personal injuries based on an implied warranty theory because it is considered a tort action. However, privity is required for the same action if the damages requested are property damages because the action would be considered one in contract. In *Iacono v. Anderson Concrete Co.* the Supreme Court of Ohio refused to recognize any material difference between property damages or personal injury damages. The court stated that it "perceive[d] no rational basis for distinguishing between the two."[105] Thus, the Ohio Supreme Court probably would not allow a subsequent purchaser to recover on an implied warranty of workmanlike construction theory even if personal injuries were sustained.

2. *The Builder as Insurer: Absolute Liability?*

The Ohio Supreme Court's second reason for refusing to extend the *Mitchem* duty to subsequent purchasers is that "[a] builder-vendor should not be required to act as an insurer for subsequent vendees."[106] The court envisioned the possibility of a builder being brought into court forty years after constructing a house because the walls had begun to crack. This picture is far from realistic. The supreme court seems unduly concerned with the notion of an absolute liability that will be imposed upon the builder. The court again fails to recognize the difference between an implied warranty of habitability

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100. Haskell, *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 654 (1965).

101. Comment, *Torts—Implied Warranty in Real Estate—Privity Requirement*, 44 N.C.L. REV. 236, 239 (1965). *See supra* note 92.

102. *See, e.g.*, Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768, 770 (1980).

103. *Id.*

104. Barnes v. MacBrown & Co., Inc., 264 Ind. 227, 231, 342 N.E.2d 619, 621 (1976) (DeBruler, J., dissenting); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). *See* Comment, *Torts—Implied Warranty in Real Estate—Privity Requirement*, 44 N.C.L. REV. 236, 237-38 (1965).

105. 42 Ohio St. 2d 88, 93, 326 N.E.2d 267, 270 (1975).

106. Insurance Co. of N. Am. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 271, 416 N.E.2d 623, 625 (1980).

and an implied warranty of workmanlike construction. Absolute liability will not be imposed upon a builder if the court extends the *Mitchem* duty of workmanlike construction. The subsequent purchaser has the same burden of proof as the first purchaser: he must prove that the latent defect was caused by the builder's failure to exercise proper workmanship. As *Hubler v. Bachman*[107] illustrates, this is not an easy burden of proof to meet. In *Hubler* the purchaser failed to show that the cracked plaster was due to the fault of the builder and, therefore, was unable to recover.[108] Thus, in Ohio an innocent builder would not be subject to the frivolous claims of a greedy homeowner.

Under the traditional contract model, extending the warranty to subsequent purchasers would make the builder an insurer of sorts. Any warranty between the builder and original purchaser would be supported by consideration passing between the two parties. When the original purchaser sells to the subsequent buyer, the builder takes no part in the transaction and receives no compensation. Allowing the subsequent purchaser to state a cause of action against the builder would place the builder in the position of an insurer. This view, however, is far from realistic.

Under the more realistic economic model, extending the warranty to a subsequent purchaser does not place the builder in the position of an insurer. In the contract between the first purchaser and the builder, a certain portion of the compensation is allocated to purchase warranty protection that will extend for a reasonable period of time. In the contract between the first and second purchaser, the first purchaser is selling his remaining interest in the warranty; and although the builder is not a party to this contract, he already has been compensated for this warranty. By viewing the sale to the second purchaser as an arbitrary end to the protection afforded by this warranty, the court is granting the builder a windfall because he has received compensation for a warranty he will not be required to fulfill. Thus, if a defect resulting from the builder's unworkmanlike construction occurs within a reasonable time, the builder should be liable and should correct the defect, regardless of who owns the house. The subsequent purchaser's rights are related directly to the rights of the first purchaser; thus, if the first purchaser could have maintained an action against the builder, the subsequent purchaser also should have a cause of action. The builder cannot complain if he is held liable for workmanship that fails to meet the standards of a reasonable builder.

3. *A Decision Best Left to the Legislature*

The *Bonnie Built Homes* court's third reason for refusing to extend the *Mitchem* duty to subsequent purchasers is that the decision to extend war-

107. 12 Ohio Misc. 22 (1967).
108. *Id.* at 23.

ranty protection is best left to the state legislature.[109] Although this consideration is valid, in most states, including Ohio, causes of action based on implied warranty are granted by courts, not legislatures.[110] State legislatures probably would not pass a statute extending liability based on an implied warranty of workmanlike construction because of the strong lobbying force behind the building industry.[111] In other areas of the law, particularly products liability, the Ohio Supreme Court has not waited for the legislature to act and has extended the scope of liability.[112] No reason exists for the court to refuse to act in the area of workmanlike construction. The court's argument is nothing but a make-weight.

B. *Other Reasons for Not Extending the Warranty to Subsequent Purchasers*

Other state courts facing issues similar to those raised in *Bonnie Built Homes* have refused, on other grounds, to extend the warranty of habitability to subsequent purchasers.[113] One such ground is a fear of injustice to the builder because the first purchaser waived or accepted the defects in the home.[114] The Mississippi Supreme Court stated, "It would be strange indeed if, when the original purchaser conveyed the property to another, that his vendee could resort to the builder for damages for deficiencies in workmanship or materials which the original purchaser from the builder had accepted."[115]

The Mississippi Court's analysis is flawed for two reasons. First, the original purchaser probably could not waive or accept latent defects that became apparent only after he had sold the house. And second, even if the original purchaser did waive or authorize the defect for economic or other reasons,[116] and the second purchaser is "estopped to complain of the quality, type, class or kind of construction or material, or as to the strength, durability and appearance of the structure,"[117] the second purchaser has, in most states, a cause of action against the original purchaser for "silent fraud"[118]—

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109. Insurance Co. of N. Am. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 271, 416 N.E.2d 623, 625 (1980). States that have a statutory warranty include: Connecticut, CONN. GEN. STAT. § 52-563a (1981); Louisiana, LA. CIV. CODE ANN. art. 2520 (West 1952).

110. *See supra* cases cited in notes 2 & 5; Annot., 25 A.L.R.3d 383 (1969).

111. The Connecticut statute does not apply to second purchasers, but the Louisiana statute does. *See supra* note 109.

112. *See* Iacono v. Anderson Concrete Co., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

113. Strathmore Riverside v. Payer Dev. Corp., 369 So. 2d 971, 973 (Fla. Dist. Ct. App. 1979); Oliver v. City Builders, Inc., 303 So. 2d 466, 468 (Miss. 1974).

114. *See* Oliver v. City Builders, Inc., 303 So. 2d 466, 468 (Miss. 1974).

115. *Id.*

116. *Id.*

117. *Id. See* Haskell, *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 640 (1965); 11 S. WILLISTON, LAW OF CONTRACTS § 1399A (3d ed. 1961 & Supp. 1980). *See also supra* text accompanying note 68.

118. Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 12 (1936).

a knowing nondisclosure of a material fact upon which the second purchaser relied in making the decision to purchase the home.

The more difficult situation occurs when the defect is caused by the purchaser's faulty design and not by the builder's lack of workmanship.[119] The first purchaser could not recover for this defect,[120] and under the analysis described above the subsequent purchaser would be similarly estopped from bringing an action against the builder for this defect. The second purchaser thus should be advised that the first purchaser designed the home. If this fact has not been disclosed, the second purchaser has a cause of action for nondisclosure against the first purchaser-designer.

C. *Extension of Warranty to Subsequent Purchasers*

1. *Policy Reasons for Extension*

Courts extending an implied warranty to subsequent purchasers base their decision on policy reasons. In most cases the courts extend a warranty of habitability, which places a greater burden on the builder than does a duty of workmanlike construction. The courts view the warranty as protection for the American family's single largest expenditure.[121] Without the warranty the subsequent purchaser would be without recourse against the builder if the house began to fall apart and became uninhabitable. The homeowner thus would lose the value of his investment through no fault of his own. A subsequent purchaser of a relatively new home is not deserving of less protection than the original purchaser. The home is still the single largest expenditure of the family, and its value can be impaired substantially if major defects occur.[122]

Courts also have extended the warranty to protect the "average purchaser who is without adequate knowledge or opportunity to make a meaningful inspection"[123] of the house. In today's complex society, when specialization is required in many fields, the days of the rugged self-sufficient individual have ended. It is unreasonable to expect a layman to detect numerous defects, some latent, in a new home. The purchaser should be able to rely on the builder's workmanship, and "courts [should] judicially protect the victims of shoddy workmanship."[124] Courts have been willing to protect the first purchaser because he is unable to make a meaningful inspection; no justification

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119. This may be the case in *Bonnie Built Homes*, because Mudge did design the house, and there is some hint that the defective roof was due to faulty design. Brief for Appellee at 7, Insurance Co. of N. Am. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 416 N.E.2d 623 (1980).

120. *See supra* note 117 and accompanying text.

121. Blagg v. Fred Hunt Co., 272 Ark. 185, 185, 612 S.W.2d 321, 322 (1981); Moxley v. Laramie Builders, Inc., 600 P.2d 733, 735 (Wyo. 1979).

122. Blagg v. Fred Hunt Co., 272 Ark. 185, 186, 612 S.W.2d 321, 322 (1981).

123. Moxley v. Laramie Builders, Inc., 600 P.2d 733, 735 (Wyo. 1979).

124. *Id.*

exists for refusing to extend similar protection to a similarly positioned second purchaser.

Extending a warranty of workmanlike construction or habitability to subsequent purchasers is simply a recognition of the realities of today's housing situation. The construction industry in the United States resembles mass manufacturing: houses are mass-produced in the manner of consumer goods.[125] The overriding "purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work. With that object in mind, any reasoning that would arbitrarily interpose a first buyer as an obstruction to someone equally deserving of recovery is incomprehensible."[126]

"Our society is an increasingly mobile one."[127] The likelihood of a new home being sold during the first few years after the original purchase is greater than in the past. Any builder of a new home should foresee the possibility that the house may be sold and that his work may affect other persons. The builder should expect to be held responsible for a house for a reasonable time, regardless of who owns the home.

When a subsequent purchaser buys a house that is only a few years old, he has a right, as did the original purchaser, to rely on the builder's workmanship. The age of the house is often a major selling point: the subsequent purchaser probably has purchased a relatively new home instead of an older home and has paid substantially more for the newer house. A relatively new home should be free of the defects commonly associated with older houses.

2. *Limits on the Extension of Warranty to Subsequent Purchasers*

The courts that have extended a warranty to subsequent purchasers have limited the warranty to latent defects that become apparent after the purchase.[128] The subsequent purchaser is required to make a reasonable inspection to find all patent defects.[129] The warranty is extended only for a reasonable period of time.[130] The age of the home, the manner in which it has been used, and its maintenance record are relevant circumstances in determining whether the builder should be liable for any latent defects.[131]

If Ohio courts adopt a warranty of workmanlike construction that covers subsequent purchasers, the duty should extend for the life of the home, but should be limited to latent defects discovered after the sale and not reasonably discoverable prior to the sale of the home. The subsequent purchaser should

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125. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

126. Moxley v. Laramie Builders, Inc., 600 P.2d 733, 736 (Wyo. 1979).

127. Barnes v. MacBrown & Co., Inc., 264 Ind. 227, 229, 342 N.E.2d 619, 620 (1976).

128. Blagg v. Fred Hunt Co., 272 Ark. 185, 186, 612 S.W.2d 321, 322 (1981); Barnes v. MacBrown & Co., Inc., 264 Ind. 227, 229, 342 N.E.2d 619, 621 (1976); Terlinde v. Neeley, 275 S.C. 395, 395, 271 S.E.2d 768, 770 (1980); Moxley v. Laramie Builders, Inc., 600 P.2d 733, 736 (Wyo. 1979).

129. *See supra* cases cited in note 128.

130. *See supra* cased cited in note 128.

131. Barnes v. MacBrown & Co., Inc., 264 Ind. 227, 229, 342 N.E.2d 619, 621 (1976).

carry the burden of proving that the defect was caused by the builder's actions. The statute of limitations also will limit liability. The emphasis of the duty is to avoid hidden defects and concealed dangers.[132]

III. CONCLUSION

By denying the plaintiff's cause of action in *Bonnie Built Homes*, the Ohio Supreme Court forced the subsequent purchasers to bear the entire loss of the home's defective roof. The court relied on the archaic concept of privity of contract as a rationale for refusing to extend the *Mitchem* warranty of workmanlike construction. The court refused to accept the plaintiff's analogy to Ohio products liability cases that did not require the parties to be in privity to establish a claim. It supported the privity requirement by asserting that the builder should not be placed in the position of an insurer. As additional support for its position, the court utilized the make-weight argument that extension of a warranty is "best left up to the legislature." As this Case Comment has shown, the court's reasoning on any point cannot withstand any level of scrutiny.

The ultimate question in workmanlike construction cases is: Who is to assume the risk of latent defects? In Ohio the first purchaser assumes all risks of defects that he cannot prove were caused by the builder. The second purchaser assumes all risks. In other states that have extended the warranty of habitability to purchases after the first sale the builder assumes all risks due to the defect unless he can show that the first purchaser caused the defect; after the second purchase the builder assumes all risks unless he can prove the defects are attributable to the first or second purchaser.

Ohio should follow the Indiana Court of Appeals and adopt a cause of action similar to that set forth in *Barnes v. MacBrown & Co., Inc.*[133] The action would be limited to latent defects that are not discoverable at the time of sale and become apparent only afterwards. The burden should be on the plaintiff to show that the builder was responsible for the defect. The builder may rebut by presenting any evidence that would show that other factors contributed to the defect.

The extension of a duty of workmanship to subsequent purchasers places the second purchaser in the same position as the first purchaser. He assumes the risk of latent defects that cannot be attributed to the builder's poor workmanship. Thus, the builder's liability is limited, and the second purchaser is afforded some protection. The builder cannot complain of an action that lies because of his poor workmanship; he should be held liable for his error. The second purchaser, although not granted absolute protection, at least receives the same protection afforded the first purchaser.

David J. Strasser

132. *Id.* at 229, 342 N.E.2d at 620.
133. 264 Ind. 227, 342 N.E.2d 619 (1976).